



September 28, 2000

Mr. Dean J. Johnson
Police Legal Advisor
Beaumont Police Department
P.O. Box 3827
Beaumont, Texas 77704-3827

OR2000-3736

Dear Mr. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 139717.

The Beaumont Police Department (the "department") received a written request from a rejected job applicant for documents pertaining to the requestor's background investigation. You first contend that the requestor had previously signed a "waiver" of his right to review the information at issue, and that because of that "contract" the department is not required to release the information to the requestor. In the alternative, you contend that the requested information is excepted from public disclosure pursuant to sections 552.101, 552.102, 552.108, and 552.111 of the Government Code.

It is well established that a governmental body cannot, through a contract, overrule or repeal provisions of the Public Information Act (the "act"). Attorney General Opinion JM-672 (1987); *see also Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). Consequently, information is not confidential under the act simply because the party submitting the information anticipates or requests that it be kept confidential. We further note that the act requires that a governmental body must treat all requests for public information uniformly. *See* Gov't Code § 552.223. Accordingly, the department may not treat the current request any differently than a request for the same information from any other member of the public. *See also* Gov't Code § 552.007 (prohibiting selective disclosure). Consequently, unless the requested information falls within one of the act's exceptions to disclosure, the information must be released, notwithstanding any "contract" between the department and the requestor specifying otherwise.

We next note that you have not informed us of the date the department received the current records request. Section 552.301 of the Government Code dictates the procedure that a governmental body must follow when it seeks a decision from the attorney general as to whether requested information falls within an exception to disclosure. Among other requirements, the governmental body must submit "a signed statement as to the date on which the written request for information was received by the governmental body or evidence sufficient to establish that date." Gov't Code § 552.301(e)(1)(C). Otherwise, the requested information "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302.

You contend that the requested information is excepted from public disclosure pursuant to sections 552.101, 552.102, 552.108, and 552.111 of the Government Code. You have not shown a compelling reason for withholding the information at issue pursuant to section 552.108 or 552.111 of the Government Code. Accordingly, we deem these exceptions waived. *See* Open Records Decision No. 177 (1977) ("law enforcement" exception is waivable); Open Records Decision No. 470 (1987) (section 552.111 is waivable). The department may not withhold any of the information at issue pursuant to either of these exceptions.

On the other hand, a demonstration that information is made confidential by laws outside the act or that the information comes under the protection of an exception to disclosure intended to protect the privacy interests of an individual constitutes a compelling reason for non-disclosure. *See* Open Records Decision No. 150 (1977). Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Among the records at issue is a polygraph examination report regarding the requestor. Section 1703.306 of the Occupations Code governs the release of polygraph information and provides in pertinent part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) *the examinee* or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occupations Code § 1703.306(a), (b) (emphasis added). Although this provision prohibits the release of polygraph information to anyone other than those individuals listed in subsection (a), in this instance, the examinee/requestor has a special right of access to the polygraph information pursuant to section 1703.306(a)(1) of the Occupations Code. Consequently, the department may not withhold the polygraph information from the requestor pursuant to any of the exceptions you have raised.

You also contend that the records at issue are protected from public disclosure pursuant to common law privacy as incorporated into sections 552.101 and 552.102(a). Common law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and it is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). After reviewing the information at issue, we conclude that the only information that implicates common law privacy pertains only to the requestor. The department may not withhold such information from this requestor on privacy grounds. *See* Gov't Code § 552.023.

Accordingly, we conclude that the department must release all of the information at issue to this particular requestor. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental

body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/RWP/ljp

Ref: ID# 139717

Encl. Submitted documents

cc: Mr. John Estillette
7200 Heard Lane #614
Galveston, Texas 77551
(w/o enclosures)